BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RUSSELL W. COMPTON Claimant	)	
VS.	)	
BURNETT AUTOMOTIVE, INC. Respondent	)	Docket No. **1,050,026**
AND	)	
CONTINENTAL WESTERN INS. CO. Insurance Carrier	)	

ORDER

Claimant requests review of the May 3, 2010 Preliminary Decision entered by Administrative Law Judge Marcia Yates Roberts.

ISSUES

Claimant injured his left knee at work and was receiving medical treatment including physical therapy. After a session of physical therapy the claimant was working in his yard at home. When he laterally stepped across a hole he was filling his knee gave way. Claimant advised respondent of the incident and respondent refused to provide additional treatment. Respondent concluded claimant had suffered an independent intervening accidental injury.

The Administrative Law Judge (ALJ) found claimant suffered an intervening accident at home that resulted in a permanent aggravation of the original injury. The ALJ further found that respondent is not liable for the additional medical treatment for the left knee.

Claimant requests review and argues his need for medical treatment is due to the injury at work as the incident at home was a natural and probable consequence of his work-related injury.

Respondent argues the Board does not have jurisdiction as the only issue is whether claimant is entitled to additional medical treatment. In the alternative, the

respondent requests the Board to affirm the ALJ's finding that claimant suffered an intervening non-work-related injury.

The issues for the Board's review are:

(1) Does the Board have jurisdiction of the issues in this appeal?

(2) Do claimant's current symptoms and need for medical treatment arise out of and in the course of his employment with respondent, or did claimant suffer an intervening injury which relieves respondent of liability for preliminary benefits?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2009 Supp. 44-551(i)(2)(A) states in part:

> If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

> Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In *Allen*[1], the Kansas Court of Appeals stated:

> Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.[2]

Whether claimant's current condition and need for medical treatment is due to the work-related accident gives rise to the jurisdictional issue of whether claimant's current injury arose out of and in the course of his employment with respondent. Furthermore, whether the incident on March 4, 2010, constituted an intervening accident that relieves respondent of liability is a defense that likewise is one of the issues listed as jurisdictional under K.S.A. 44-534a(a)(2). The Board has jurisdiction to address this appeal.

Russell Compton has been employed for approximately two years as an auto technician with respondent. His job duties included inspecting and repairing vehicles as well as diagnostics and maintenance of vehicles. On January 29, 2010, claimant was on his knees reaching underneath a car trying to pull on a lifting arm when he heard his left knee pop. He reported the injury to his supervisor but did not seek medical treatment at that time. Claimant finished working that day, Friday, and also worked on Saturday even though the knee was sore. A couple of weeks later claimant asked to seek medical treatment. He testified:

> Q. Why did you wait two weeks?
>
> A. Well, the soreness subsided after, you know, about three or four days, and then later that week, it – I'd be walking across the parking lot and I'd catch it. It would almost pop out again, and then it did it a second time, and that's when I thought I better get it looked at.
>
> Q. Now, when you say it almost popped out, what are you talking about?
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> A. Well, it – I could feel it catch. I'd be walking along and something would shift and it would catch and I'd stop what I was doing and had to go back in.[3]

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[1] *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

[2] See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

[3] P.H. Trans. at 8.

Claimant was first examined on February 18, 2010, by Dr. William Tiemann. X-rays of the left knee were normal. The doctor ordered physical therapy for claimant in order to strengthen his quadriceps and return him to full-duty work. Dr. Tiemann diagnosed claimant as having a patellar subluxation. Claimant testified that while at physical therapy he had occasions where his knee felt like it almost popped out and he advised the physical therapist. And although the physical therapy helped claimant continued to experience the popping sensation in his knee.

After a physical therapy session on March 4, 2010, claimant was at home in his backyard getting ready to fill a hole. When he stepped sideways over the shoulder width hole his knee gave away and buckled causing extreme pain and swelling. The next day claimant returned to respondent's physician, Dr. Dean, who recommended an MRI and noted he suspected a medial meniscus tear in claimant's left knee. Claimant also received some pain medication and steroids as well as a brace for his knee. But respondent refused to provide further medical treatment based upon the conclusion that claimant had suffered a new non-occupational intervening injury on March 4, 2010.

Claimant testified that the buckling sensation that he had on March 4th was different than the popping sensation that he had previously. He further testified that his knee did not have significant swelling until after the incident in his backyard. Despite the popping and clicking sensation in his left knee, claimant has returned to full-time work.

At the request of claimant's attorney, Dr. Edward Prostic examined and evaluated claimant on April 12, 2010. The doctor opined:

> It is my belief that he sustained a tear of the posterior horn of a meniscus rather than a patellar subluxation while on his knees to pull on a lift and going to get up when he felt something slip out of place in his knee. The incident that he reported occurring at home was merely a temporary aggravation of the accident sustained at work.[4]

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*[5], the Court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1).

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[4] P.H. Trans., Cl. Ex. 1.

[5] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*[6], the Court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig*[7], the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber*[8], the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."[9]

But in *Logsdon*[10], the Court of Appeals found that an aggravation in 2004 of a 1993 shoulder injury was compensable as a natural consequence of the original injury because claimant had remained symptomatic and the prior injury had never fully healed.

> When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence

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[6] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[7] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[8] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

[9] *Id.* at 728.

[10] *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, 128 P.3d 430 (2006); see also *Nance v. Harvey Co.*, 263 Kan. 542, 952 P.2d 411 (1997).

> that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.
>
> When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.[11]

"A workers compensation claimant's testimony alone is sufficient evidence of the claimant's physical condition."[12]

Here, this Board Member finds these facts to be more akin to that found in *Gillig*, rather than *Stockman*. Claimant's left knee, while improved, had not completely resolved. Although claimant had been released to regular duties by his treating physician, claimant was still undergoing a regime of physical therapy and had told his physical therapist that he continued to experience a popping sensation in his left knee. And Dr. Prostic concluded claimant's current knee condition was the result of his work-related injury.

In situations such as this, there is often a very fine line between what would be described as a new and separate accidental injury versus a natural consequence of the original injury. In this instance, based upon the record compiled to date, this Board Member finds that claimant's condition did arise out of his employment with respondent and is a natural consequence of the original injury with respondent. Accordingly, the ALJ's Preliminary Decision is reversed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[13] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[14]

WHEREFORE, it is the finding of this Board Member that the Preliminary Decision of Administrative Law Judge Marcia Yates Roberts dated May 3, 2010, is reversed.

IT IS SO ORDERED.

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[11] *Logston*, 35 Kan. App. 2d 79, Syl. ¶¶ 2, 3.

[12] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, Syl. ¶ 2, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[13] K.S.A. 44-534a.

[14] K.S.A. 2009 Supp. 44-555c(k).

Dated this 30th day of July 2010.

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DAVID A. SHUFELT
BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier
Marcia Yates Roberts, Administrative Law Judge